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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 1

MILK WAGON DRIVERS UNION OF CHICAGO, LOCAL 753, A VOLUNTARY UNINCORPORATED ASSOCIATION; ROBERT G. FITCHIE, JAMES KENNEDY, STEVE SUMNER, FRED O. DAHMS, F. RAY BRYANT, ALBERT O. RICHARDS, JOSEPH L. PATTERSON AND DAVID RISKIND,

Petitioners,

vs.

MEADOWMOOR DAIRIES, INC., A CORPORATION,

Respondent.

BRIEF OF RESPONDENT.

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MEADOWMOOR DAIRIES, INC., A CORPORATION,

Respondent.

BRIEF OF RESPONDENT.

To the Honorable Charles Evans Hughes, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

I.

OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of Illinois is reported in 371 Ill. 377, 21 N. E. (2d) 308, and it appears in the Record at pp. 330-345.

II.

JURISDICTION.

Question Presented by Petitioners.

Petitioners contend (Brief, p. 2) that the record in this case presents the Federal question of whether an injunction by a state equity court restraining the carrying of banners on a public sidewalk in a peaceful manner violates the right of free speech guaranteed by the Federal Constitution. To sustain the jurisdiction of this Court, petitioners assert that they claimed "certain rights, privileges and immunities of free speech under the 14th Amendment" in the Illinois Supreme Court, which were denied by that Court.

The Record Shows That Petitioners Did Not Claim Any Right Under the Federal Constitution in the Courts Below.

The record does not support petitioners' assertion but on the contrary shows that no right, privilege or immunity under the Federal Constitution was specially set up or claimed by petitioners in the Courts below.

No such claim was set up in petitioners' answer to respondent's complaint for injunction (R. 29-39), and therefore no Federal question was presented to the Master who heard this cause in the first instance. After the Master's report, recommending the issuance of a permanent injunction restraining the unlawful conspiracy and the picketing which accompanied it, was filed petitioners amended their answer and filed objections to said report but they made no claim of any right under the *Federal* Constitution therein (R. 249-258; R. 235-249), although petitioners did claim that an injunction against picketing would abridge rights guaranteed to them by the *State* Constitution (R. 258). The

record presented no claim of Federal Constitutional rights to the Chancellor for decision. The Chancellor's decree permitting picketing of stores selling respondent's products was based solely upon the Chancellor's construction and application of the Illinois Anti-Injunction Act in accordance with petitioners' exceptions (R. 257-258).

This respondent, upon appeal to the Illinois Supreme Court, contended that such construction and application of the Illinois Act deprived the respondent of its constitutional rights (R. 284), but the petitioners by cross-appeal complained solely of the injunction restraining them from acts of violence (R. 278) and of the amount allowed for damages and attorney's fees upon the dissolution of the temporary injunction (R. 325, 326). Petitioners failed to claim any right under the Federal Constitution in the record presented to the Illinois Supreme Court.

In addition to this negative showing, the record shows *affirmatively* that petitioners never made or intended to make any claim of Federal right, prior to the filing of their petition for certiorari in this Court. **In a motion filed by petitioners in the Supreme Court of Illinois petitioners stated that no question under the Federal Constitution was involved in this case.**[1] (R. 362.)

After the Illinois Supreme Court filed its opinion, which petitioners *now* contend denied their alleged claim of the right of free speech guaranteed by the Federal Constitution, petitioners sought a rehearing in that Court, not because of any claim of denial of rights under the Federal Constitution but rather, as petitioners stated in their petition for rehearing:

> "The Court is in error in law with respect to 'freedom of speech' unless it intends to overrule its prior position sub silentio, and to narrow the language of the **state constitution.**" (Emphasis ours.) (R. 352).

1. Respondent suggested diminution of the record in this respect and on October 23, 1939 this Court granted the respondent's motion for a writ of certiorari to supply the omitted motion.

The Supreme Court of Illinois Did Not Decide the Alleged Federal Question.

The petitioner's contention as to jurisdiction is predicated solely upon a single sentence in the opinion of the Illinois Supreme Court, which appears in the introductory statement of the case wherein the Court said:

> "The appellees (petitioners here), by cross appeal claim that an injunction restraining the carrying of banners in a peaceable manner would restrict the right of free speech guaranteed by the Federal and State Constitutions" (R. 332; 371 Ill. at 380).

As mentioned above, the Illinois Supreme Court was mistaken in stating that petitioners' cross appeal set up any such claim. **Petitioners' cross appeal was limited to an attack upon the provisions of the decree enjoining acts of violence and to the alleged inadequacy of the award of damages and attorney's fees** (R. 325, 326). There is no justification for petitioners' assertion that the Illinois Supreme Court *construed* the notice of cross appeal as raising the alleged Federal claim. The statement quoted from the opinion cannot import into this record and into the notice of cross appeal the alleged Federal claim which otherwise the record wholly fails to present.

In *Honeyman* v. *Hanan*, 300 U. S. 14, this Court held that the determination whether a Federal question was necessarily passed upon by the state court must rest upon an examination of the record, saying on p. 18:

> "A certificate or **statement by the state court that a Federal question has been presented to it and necessarily passed upon is not controlling.** *While such a certificate or statement* may aid this Court in the examination of the record, *it cannot avail* to foreclose the inquiry which it is our duty to make or *to import into the record a Federal question which otherwise the record wholly fails to present.*"[2]

While in *Parmalee* v. *Lawrence*, 11 Wall. 36, the certifi-

2. Emphasis supplied in quotations unless otherwise noted.

cate was made by the presiding judge of the state court and not by the court itself, this Court took occasion to say (p. 39):

> "We will add, if this court should entertain jurisdiction upon a certificate alone in the absence of any evidence of the question in the record, then the Supreme Court of the State can give jurisdiction in every case where the question is made by counsel in the argument."

The rule that a statement or certificate of the state court is incompetent to originate a Federal question not otherwise presented by the record is set forth in the following additional decisions:

Lawler v. *Walker*, 14 How. 149, 152.
Powell v. *Brunswick County*, 150 U. S. 433, 439.
Rector v. *City Deposit Bank Co.*, 200 U. S. 405, 412.
Louisville & N. R. Co. v. *Smith*, 204 U. S. 551, 561.
Purcell v. *New York C. R. Co.*, 296 U. S. 545.

In the Illinois Supreme Court, petitioners attempted to avoid the finding that they had engaged in an unlawful conspiracy carried into effect by acts of violence, boycotting and picketing of stores selling respondent's products, by contending that the object of their campaign was lawful and that the means used were legal. In the latter regard they argued that the picketing was lawful in Illinois under the provisions of the Illinois Anti-Injunction Act and incidentally that "peaceful picketing" was a constitutional right regardless of statutory authorization, citing the oft-quoted statement from the opinion of Mr. Justice Brandeis in *Senn* v. *Tile Layers Union*, 301 U. S. 468 at 478.

Even if we assume that this argument was intended as the claim of Federal right, it does not avail petitioners, for it is well settled that briefs and arguments of counsel form

no part of the record and are not adequate to create a Federal question when the record does not disclose that such question was set up or claimed in any proper manner in the state courts.

Zadig v. *Baldwin,* 166 U. S. 485, 488.
Gibson v. *Chouteau,* 8 Wall. 314.
Sayward v. *Denny,* 158 U. S. 180.
Chicago & N. W. R. Co. v. *Chicago,* 164 U. S. 454, 457.

The Illinois Supreme Court discussed the question whether the right of free speech was involved in the restraint of the unlawful conspiracy, including the overt acts of picketing and boycotting in furtherance thereof. *But nowhere in its discussion of "free speech" did that Court mention the Federal Constitution* (R. 342-344). Since the Constitution of Illinois contains a clause with respect to freedom of speech (Act II, § 4), such discussion, under decisions of this Court, must be deemed to have been with reference solely to the State Constitution.

Bowe v. *Scott,* 233 U. S. 658, 664.
Gibbes v. *Zimmerman,* 290 U. S. 326, 328.

We call attention again to the fact that petitioners, in their petition for rehearing in the Illinois Supreme Court, considered that the Court's discussion of the right of free speech had reference to the State Constitution (R. 352).

The fact that the Illinois Supreme Court referred to decisions of this Court on the question of free speech does not establish that the alleged Federal question was properly raised and decided in the state court.

Levy v. *Supreme Court,* 167 U. S. 175, 177.
Osborne v. *Clark,* 204 U. S. 565, 569.

In *Howard* v. *Fleming,* 191 U. S. 126, this Court dismissed a writ of error for lack of jurisdiction, saying (p. 137):

> "It does not appear that the Federal character of the questions was presented to the Supreme Court of the state; although in the opinions of the Supreme Court the questions themselves were fully discussed. But in the absence of any claim to protection under the Federal Constitution, we are compelled to hold that we have no jurisdiction * * *."

Petitioners virtually concede that the record fails to show that this Court has jurisdiction to review the alleged Federal question, for they say (Brief, p. 8) that no other reasonable "inference" can be drawn from the opinion of the Illinois Supreme Court than that it believed the Federal question was before it under petitioners' cross appeal. The inference which petitioners attempt to draw from a single sentence of the Court's opinion (which the record conclusively shows to be in error) is incompetent to sustain the jurisdiction of this Court. To base jurisdiction upon the inference drawn by petitioners would, as stated by this Court in *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291 at 309, "be in the teeth of our decision in *F. G. Oxley Stave Co.* v. *Butler County*, and numerous other decisions." In the *Oxley* case (166 U. S. 648), it was said (p. 655):

> "This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference. * * * *Upon like grounds the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference*, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

Nor can jurisdiction of this case be inferred from the fact that the Illinois courts and Federal courts have stated in subsequent cases that the question of free speech under the Federal Constitution was decided in this case. The jurisdictional defect in this record cannot be supplied by reference to decisions and statements of courts in other

cases as to their interpretation of the denial of certiorari in this case on October 23, 1939, without regard to the fact that such denial may have been predicated upon want of jurisdiction to review the alleged Federal question. What other courts may have said as to the effect of the denial of certiorari in this case cannot invest jurisdiction, if none existed when the original order was entered.

The Decision of the Illinois Supreme Court is Based Upon Adequate Non-Federal Grounds.

Jurisdiction is lacking even though it is assumed that the Illinois Supreme Court decided the alleged Federal question. The decision of that Court rests upon non-federal grounds which independently and adequately support its judgment.

While this proposition partakes somewhat of the arguments on the merits, it must be determined before the merits can be considered. To that extent we agree with the petitioners' statement (Brief, p. 11), but it does not follow, as petitioners suggest, that if this Court determines there is no adequate, independent, non-federal ground the decision of the Illinois Supreme Court must be reversed.

The Illinois Supreme Court held that a permanent injunction should issue restraining all acts of the respondents in furtherance of the unlawful conspiracy into which that Court found the respondents had entered (R. 339). The *admitted* acts of the respondents in boycotting and picketing stores selling respondents' products were held enjoinable as an unlawful interference with rights of the respondent protected by the common law and the Constitution of Illinois (R. 336-339). The Court further held that the evidence established, as the Master found, that the respondents were engaged in an unlawful conspiracy and that the picketing of the stores was in furtherance of such conspiracy and constituted an illegal boycott (R. 339, 340).

Finally, the Court determined that the picketing, in connection with and following a series of assaults and destruction of property by members of the petitioner Union, had the effect of force and intimidation and was so interwoven with such acts of violence that the Union could not, in equity, claim that there should be a severance of the alleged lawful acts from the unlawful acts (R. 340).

These matters are independent of the alleged Federal claim for they comprise the application of principles of state law under the Constitution, the statutes, decisions and the common law of Illinois to facts found by the Courts.

As to what factual situation constitutes a boycott that may be enjoined is unquestionably a matter of general law upon which the decision of a state court is conclusive. Recognition of this principle appears in many decisions of this Court, typical of which are the following:

Gompers v. *Buck's Stove and Range Co.*, 221 U. S. 418 (See page 437 where this Court sets forth the varying factual situations which are held to constitute boycotts under the decisions of different states).

Truax v. *Corrigan*, 257 U. S. 312 (See Note 28 on page 364 of the opinion of Mr. Justice Brandeis, where the state court decisions as to the legality of boycotts are collected, particularly the citation of an Illinois case holding boycotts, primary or secondary, to be illegal).

The conclusiveness of the decision that the boycott in this case was enjoinable under the common law of Illinois, as declared by the Illinois Supreme Court, is fully in accord with *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, where this Court said, at page 78:

> "* * * Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general', be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."

The Court's construction of the Illinois Anti-Injunction Act to the effect that under the facts in this case no labor dispute existed, is likewise conclusive.

Senn v. *Tile Layers Protective Union*, 301 U. S. 468, 477.

Finally, the Court's holding that the alleged peaceful picketing was part of an unlawful conspiracy, that under the facts proved it had the effect of force and was inseparable from the acts of violence, threats and intimidations for which petitioners were responsible, is a non-federal ground adequate to sustain the Court's judgment. The severability of the various elements of the unlawful conspiracy presented a question analogous to that decided by this Court in *Fox Film Corporation* v. *Muller*, 296 U. S. 207, in which this Court said, at page 210:

> "Whether the provisions of a contract are non-severable, so that if one be held invalid the others must fall with it, is clearly a question of general and not of federal law."

It therefore appears that there are several non-federal grounds, which independently and adequately support the judgment of the Illinois Supreme Court. For this reason this Court should not exercise jurisdiction to review, even though it considers that the Illinois Supreme Court decided a federal question.

Our argument with respect to the non-federal grounds is not answered, as petitioners suggest, by the recent decisions of this Court in the cases such as *Thornhill* v. *Alabama*, 310 U. S. 88, and *Carlson* v. *California*, 310 U. S. 106. We shall discuss these cases more fully in our argument on the merits. Suffice it to say at this point, that there is a vast difference between state legislation sweeping within its ambit all activity of an individual in publicizing facts in the vicinity of a place of business, without exception or differentiation between lawful and unlawful activities, and

the finding by a state equity court of facts establishing an unlawful conspiracy under state law and concerted action, including boycotting and picketing, in furtherance of the illegal object, which is held to be unlawful in the precise factual situation found to exist.

The injunction decreed by the Illinois Supreme Court was directed at the unlawful conspiracy to interfere with and destroy respondent's business. The restraint against boycotting and picketing, as well as acts of violence, all found to be in furtherance of such conspiracy, presents a different question than an injunction directed solely against peaceful picketing in a labor dispute. Under the factual situation presented by the record here, the alleged claim of free speech is not involved, but simply the power of a court of equity to enjoin an unlawful conspiracy in all its aspects as conducted by the petitioners. Under similar circumstances in the case of *Gompers* v. *Buck's Stove & Range Co.*, 221 U. S. 418, this Court held (p. 437):

> "The defendant's attack on this part of the injunction raises no question as to the abridgement of free speech, but involves the power of a court of equity to enjoin the defendant from continuing a boycott which, by words and signals, printed or spoken, caused or threatened irreparable damage. * * *
>
> "*In the case of an unlawful conspiracy,* the agreement to act in concert when the signal is published gives the words 'Unfair,' 'We Don't Patronize,' or similar expressions, a force not inhering in the words themselves, and therefore exceeding any possible right of speech which a single individual might have. * * * *When the facts in such cases warrant it,* a court having jurisdiction of the parties and subject-matter has power to grant an injunction."

We urge that the record in this case discloses want of jurisdiction. The fact that the Court first denied certiorari, then granted the writ upon petitioners' second rehearing application, did not foreclose the question of the Court's jurisdiction. In the recent case of *McGoldrick* v. *Gulf Oil*

Corp., 309 U. S. 2, after certiorari was granted, this Court dismissed the writ of certiorari for the want of jurisdiction in the absence of an *explicit* statement by the state court that it annulled a tax solely because of violation of the Federal Constitution.

For the reasons stated, we respectfully submit that the record discloses the want of jurisdiction in the instant case, and that the writ of certiorari should be dismissed upon that ground.

III.

STATEMENT OF THE CASE.

In their statement of the case petitioners have omitted findings of fact essential to the consideration of this case, including the findings of the Master as to the existence of the unlawful conspiracy entered into by petitioners, its purpose and their acts in furtherance thereof. Petitioners' attempt to justify such omissions by stating (Brief, p. 24):

> "We omit his ultimate conclusions because of course they are a matter of law."

On the contrary the question of the existence of the conspiracy, its scope and purpose are questions of fact which in an action at law are determined by the jury.

Russell v. *Post*, 138 U. S. 425.

In their objections to the Master's report petitioners described the omitted findings as findings of facts (R. 238, 239). These findings were not disturbed by the Chancellor upon the hearing of petitioners' exceptions thereto. The Illinois Supreme Court reviewed the evidence and accepted these findings as the predicate of its decision (R. 339, 340).

The omitted findings of fact are the following:

The petitioner Union, its officers and members,

entered into an unlawful conspiracy to prevent the sale and delivery of milk from respondent's dairy; such interference with respondent's business consisted of intimidation of the customers of respondent's vendors by the commission of the acts of violence enumerated; it was part of said conspiracy and activities of the petitioners to hinder the storekeepers and other retailers of respondent's milk, to prevent them from continuing the business of selling respondent's milk and to cause the customers of respondent's vendors to discontinue the purchase of such milk; **the picketing and patrolling of these stores was the result of the conspiracy to injure and destroy respondent's business** unless it agreed to abandon the so-called "vendor system" and sales to independent contractors or hire such vendors as drivers or retail route men affiliated with the members of petitioner Union. (R. 232.)

Under the facts of this case, aside from any violence shown, there could be no such situation as peaceful picketing of these stores; the very presence of pickets patrolling in front of independently owned stores was in itself intimidation both to the storekeeper and the respondent and could have no other result than to injure the business of respondent and such storekeeper. (R. 232.)

Similar findings of fact as to the existence and extent of such conspiracy were made by Judge G. E. Q. Johnson, the Master in the Federal Court proceeding instituted by respondent against petitioners prior to the instant case. The Federal Master found:

The defendant Union, its officers and members, did enter into an unlawful conspiracy to prevent the sale and delivery of milk from plaintiff's business, consisting of intimidating the customers of plaintiff's vendors by committing the acts of violence heretofore enumerated; and it was part of said conspiracy and activities of said defendants to hinder the storekeepers and other retailers of milk processed by the plaintiff and to cause the customers of plaintiff's vendors to discontinue the purchase of said milk. (R. 166.)

The matters stated by the petitioners on page 27 of

their brief as to the financial return of the vendors are not, as they purport to be, findings of fact but excerpts taken from the testimony of a few witnesses called by petitioners, who had failed to make a success of their business as vendors and at the time of their testimony had returned to the Union fold. On the other hand, witnesses, who were vendors purchasing and selling respondent's products at the time of their testimony, testified to earnings larger than members of the Union, ranging from $65 to $125 per week (R. 167, 319, 320).

The investigation of vendors' earnings by the accountant for three weeks in the summer of 1933 did not relate to vendors' purchasing respondent's products. This investigation was limited to two dairies who were in the process of changing from the "vendor system to the union drivers' system" (R. 137).

Petitioners' statement (Brief, p. 32) that respondent's counsel stipulated that the union's pickets made no attempt to stop any customers or stop deliveries to stores is incorrect. The stipulation referred to by petitioners was a statement by the Union's counsel that these pickets, if called as witnesses, would so testify (R. 149).

The interference with deliveries to stores by the picketing is admitted by the petitioners in their amendment to their answer, wherein petitioners state that drivers, after being advised of the unfairness of these stores, have refused to deliver commodities other then milk to such stores (R. 257). The petitioner Bryant and petitioners' witness Levey, a picket, also admitted that the picketing of these stores cause drivers delivering other commodities to stop "servicing" the store (R. 108, 147).

Acts of Violence.

The mere enumeration of the acts of violence committed by petitioners in connection with the picketing and boycotting of these stores does not portray clearly the campaign of intimidation and force conducted in furtherance of this unlawful conspiracy. The Master in his report abstracted the evidence of the principal witnesses as to such violence, threats and intimidation by petitioners (R. 212-223).

The evidence upon which the courts below made their findings as to violence, threats and intimidations may be found in the record as set forth in the following tabulation briefly describing the character of petitioners' activities in that respect:

As to assaults and beatings (R. 77, 78, 81, 94, 115).

As to seizure, destruction and damaging of trucks (R. 61, 68, 69, 72, 73, 74, 77, 78).

As to breaking of store windows (R. 46, 47, 59, 60, 61, 62, 64, 65, 70, 113, 114, 115, 116, 117, 118, 119, 171, 172).

As to bombing and burning of stores (R. 61, 66, 67, 71, 75, 79, 80, 114, 115, 119).

As to threats, intimidations and interference with deliveries to stores (R. 72, 73, 75, 76, 79, 80, 82, 87, 91, 102, 103, 113, 117).

The responsibility for and extent of the acts of violence is detailed in summary findings of the report of the Master in the Federal Court case. This report was confirmed by the Federal District Court in all respects (R. 167). The Federal Master found:

> The petitioner Union did not confine itself to peaceful picketing; trucks were seized, broken and their contents smashed; respondent's vendors were pursued and guns fired, and were slugged and injured by members of the Union; and *in every instance* where members of the petitioner Union were arrested for acts of violence the Union engaged counsel for them, furnished bail and paid for damages; during the time respondent has been in business, windows

of 47 stores of customers of respondent's vendors purchasing respondent's milk were broken, some more than once and some as many as 15 times; bombs were thrown into stores vending respondent's milk, and in many instances store owners selling respondent's milk were warned that violence would follow unless they desisted from such sales, and after warning, windows were broken; two members of the petitioner Union were guilty of arson and convicted of that crime for burning a milk store selling respondent's milk, these members being defended by counsel provided by the Union (R. 165, 166).

It was upon such evidence and the findings of the Master thereon, hereinabove set forth, that the Supreme Court of Illinois disposed not only of petitioners' protestation of non-responsibility for such acts but also of its contention that there could be a severance of such acts from the alleged peaceful picketing, for that Court said:

"Whether it does or not, picketing by the carrying of a banner, with the words, 'unfair,' etc., printed thereon, in connection with or following a series of assaults or destruction of property, could not help but have the effect of intimidating the persons in front of whose premises such picketing occurred and of causing them to believe that non-compliance would possibly be followed by acts of an unlawful character. Certainly it is not within the power of the retailers to prevent unlawful acts and if the defendant union puts in motion a policy which its members deem to be an invitation or license to injure persons and property, it cannot, in equity, claim that there can be a severance of the lawful acts from the unlawful ones, and thus, by disclaiming an illegal purpose, take advantage of illegal acts." (R. 340.)

Petitioners refer to what they are pleased to call the "gangster ancestry of plaintiff dairy" (Brief, p. 66) and cite a finding of the Master in the Federal Court case in that regard. Testimony as to these alleged matters offered by petitioners was stricken by the Master in this cause as being irrelevant and immaterial (R. 211, 233). While asserting the irrelevance and immateriality of the finding

of the Federal Master on this point, in order that the Court may see the basis of its immateriality and the petitioners' attempt to prejudice respondent by referring to only a portion of the finding, we set forth the finding in full:

> "Thirtieth: Prior to October of 1933 persons of ill repute and criminals undertook to act for the plaintiff corporation; that in October of 1933 the present officers and stockholders of the plaintiff corporation became the owners of all of the stock, and that they are persons of good reputation, and that the criminal acts of others claiming to represent the Meadowmoor Dairies are not in any way to be charged to the present officers and stockholders of the plaintiff corporation." (R. 322.)

Petitioners' reference to the opinion of the Board of Tax Appeals in *Humphreys* v. *Commissioner*, a proceeding wholly unrelated to the issues in this case, as confirming respondent's "gangster ancestry", and to predicate an argument that such alleged facts justified or excused the acts of violence committed by petitioners, shows that petitioners will go to any length in their desperate attempt to escape the consequences of their unlawful acts. In this connection we might mention that petitioners were indicted by the Federal Government for criminal conspiracy and the commission of the acts of violence proved against them in the instant case. (See *U. S.* v. *Borden Company, et al.*, 308 U. S. 188.)

We have added the foregoing statement of facts to demonstrate that the alleged Federal question posed by petitioners does not arise upon the record in this case. The restraint of peaceful picketing by persons in connection with a labor dispute, the predicate of petitioners' alleged claim of the denial of the right of free speech, is not involved upon the record here presented. The picketing was not peaceful but rather the concomitant of an

illegal conspiracy against the respondent carried into effect by violence, disorder and crime. The picketing was part and parcel of the unlawful scheme and program whereby petitioners intended to destroy respondent's business. The injunction of the State Courts was not directed against peaceful picketing in connection with a labor dispute (concededly lawful in all jurisdictions) but against the entire program by which petitioners sought to effectuate their illegal purpose and conspiracy.

IV.

SUMMARY OF ARGUMENT.

A. The Federal Question Posed by the Petitioners Does Not Arise Upon the Record in This Case.

The question for decision, rephrased by incorporating the *facts* in this case, is as follows:

> Does the right of free speech under the Fourteenth Amendment preclude a State Equity Court from enjoining a labor union, its officers, and members, from continuing a conspiracy, unlawful under the constitutional, statutory and common law of the State, and from continuing activities in furtherance of such conspiracy, including the boycotting and picketing of places of business accompanied by acts of violence, threats and intimidations, where under the State law and public policy no labor dispute exists between the unions and the owners of such places of business or the distributor whose product they sell?

1. The constitutional right of free speech cannot be invoked as a cloak for means used in effecting an unlawful interference with the right to carry on business.

2. The decisions of this Court interpreting the right of free speech, relied upon by petitioners, are not applicable to the factual situation in this case.

B. The Decision of the State Court That the Alleged "Peaceful Picketing" Was Unlawful Per Se and Inseparable From the Unlawful Conspiracy and Other Illegal Acts of the Petitioners in Furtherance Thereof, Is Not Reviewable.

1. Even if this question were subject to review, the decision of the State Court is in accord with applicable decisions of this Court and is sustained by the great weight of authority.

2. A court of equity, in the exercise of a wise discretion upon consideration of the unlawful campaign conducted by petitioners, could reach no conclusion other than to enjoin the illegal scheme in its entirety.

ARGUMENT.

A. The Federal Question Posed by the Petitioners Does Not Arise Upon the Record in this Case.

Petitioners state (Brief, p. 9), that the question presented for decision in this case is whether the right of free speech under the Fourteenth Amendment of the Constitution of the United States precludes a State Equity Court from enjoining individuals from carrying banners or placards on the public sidewalk in a peaceable manner conveying information to the public concerning an industrial controversy.

Petitioners phrase the alleged Federal question in this form in an apparent attempt to bring the instant case within the purview of recent decisions of this Court dealing with the problem of free speech. The question thus posed and presented by petitioners does not arise upon the record in this cause. Petitioners have attempted to abstract from the record a question which was never an issue in the proceedings in the courts below. There is no more justification for presenting such a question for decision than there is for asking an expert witness a hypothetical question, the constituent parts of which have no relation to the issues and evidence in the case.

Petitioners are attempting to secure a decision by this Court upon an abstract question of law. The answer to that question may be important in general jurisprudence, but as far as this case is concerned it is purely academic.

This point is susceptible of demonstration by rephrasing the question, using the facts appearing in the record of this case, viz.:

> Does the right of free speech under the Fourteenth Amendment preclude a State Equity Court from enjoining a labor union, its officers and members, from

continuing a conspiracy, unlawful under the constitutional, statutory and common law of the State, and from continuing activities in furtherance of such conspiracy, including the boycotting and picketing of places of business accompanied by acts of violence, threats and intimidations, where under the State law and public policy no labor dispute exists between the unions and the owners of such places of business or the distributor whose product they sell?

The question phrased as above is the sole question arising upon the record in this case. It is only by the omission of all of its constituent parts, save that of the picketing activities, that it can be resolved into the question posed by the petitioners, and then only by the unwarranted allegation that the picketing was peaceable. Of necessity, petitioners have attempted to cast aside all other elements, for the reason that as to such matters the decision of the Illinois Supreme Court is conclusive and not subject to review in this Court.

The Illinois Courts found that petitioners had entered into a conspiracy unlawful in its purpose and in the means by which it was effected. The object of the concerted action was to injure and destroy plaintiff's business, maliciously and without legal justification. The means used were clearly illegal, comprising acts of violence such as assaults, seizure and destruction of property, bombings, burning, breaking of windows of stores selling respondent's products, and threats against and intimidation of the owners of such stores by boycotting, picketing and interference with deliveries of commodities other than those of respondent sold therein. To isolate from the whole illegal scheme one phase of the activities and call it "peaceful picketing in an industrial controversy" is to distort facts judicially found in this case. Under the facts thus proved, as stated by the Master below, there could be no such situation as peaceful picketing in this case (R. 232).

The Gompers Case.

Under the facts in this case petitioners' attack upon the injunction directed by the Illinois Supreme Court "raises no question as to the abridgement of free speech." (*Gompers* v. *Buck's Stove & Range Co.*, 221 U. S. 418.) Petitioners recognize the *Gompers* case as a barrier to their contention that the right of free speech is here involved, by asserting (Brief, p. 58) that the *Gompers* case is not controlling and that the language used therein is dicta.

Petitioners misconceive the applicable principle of *stare decisis*. The decision of this Court that the injunction against concerted action by words and signals was valid and did not abridge the right of free speech, was not *obiter dictum*. That question was presented and decided by the Court even though the conviction for contempt was reversed upon another ground. The applicable rule is stated in *Florida Central R. Co.* v. *Schutte*, 103 U. S. 118, at page 143:

> "It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter."

Again, in *Union P. R. Co.* v. *Mason City & Ft. D. R. Co.*, 199 U. S. 160, this Court said, at page 166:

> "Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no just sense, be called mere *dictum*."

The petitioners in the *Gompers* case contended that the injunction was a nullity as an abridgement of the right of free speech. The contention thus advanced, and the decision of this Court with respect thereto, is shown by the following statement of the Court (p. 436):

> "Insisting, therefore, that the court could not abridge the liberty of speech or freedom of the press,

> the defendants claim that the injunction as a whole was a nullity, and that no contempt proceedings could be maintained for any disobedience of any of its provisions, general or special.
>
> "*If this last proposition were sound,* it would be unnecessary to go further into an examination of the case or to determine whether the defendants had in fact disobeyed the prohibitions contained in the injunction."

The Court thereupon notes that other courts differ as to what constitutes a boycott that may be enjoined. The Court continues (p. 437):

> "But whatever the requirement of the particular jurisdiction, as to the conditions on which the injunction against a boycott may issue, when these facts exist, the strong current of authority is that *the publication and use of letters, circulars and printed matter may constitute a means whereby a boycott is unlawfully continued,* and their use for such purpose may amount to a violation of the order of injunction."

This Court then determines, as previously quoted on page 11, that in the case of an unlawful conspiracy the concerted action of publishing or speaking, gives to the words or signals used a force not inhering in the words themselves and therefore exceeding any possible right of speech which a single individual might have.

It was only after the Court had determined the validity of the injunction as against the contention that it abridged the right of free speech that the Court considered other issues in the case. The language used in this decision concerning the right of free speech has been quoted with approval in the following cases: *Schenck* v. *United States,* 249 U. S. 47, at page 52; *Near* v. *Minnesota,* 283 U. S. 697, at page 716.

As a last resort petitioners criticize the language of this Court used in the *Gompers* case to describe picketing as being based upon economic and social misconception. It is rather the petitioners who misconceive the gist of

that decision. "Peaceful picketing," upon which petitioners predicate their argument here, was not involved in the *Gompers* case any more than it is in the instant case. The injunction in that case was directed against an unlawful conspiracy, comprising an agreement to act in concert in continuing a boycott by the use of printed and spoken words. The Court did not merely enjoin an individual from exercising his right of speech but rather restrained the entire illegal scheme of which the speech was an instrumentality.

The Aikens Case.

This concept of the decision in the *Gompers* case is fortified by the opinion of Mr. Justice Holmes in *Aikens* v. *Wisconsin,* 195 U. S. 193, wherein this Court reviewed convictions under a Wisconsin statute imposing punishment of a combination for the purpose of wilfully or maliciously injuring another in his trade or business. The Court pointed to the fallacy of the argument that the means used in the particular combination could not be punished because they were simply the abstinence from making contracts, by stating (p. 206):

> "When the acts consist of making a combination calculated to cause temporal damage, the power to punish such acts; when done maliciously, cannot be denied because they are to be followed and worked out by conduct which might have been lawful if not preceded by the acts. No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot, neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law."

Under this principle, even though it is assumed that the means used by the petitioners here to further their purpose comprised solely "peaceful picketing," which under

other circumstances might have been lawful, since the record shows conclusively that the picketing as conducted by petitioners was a step in the unlawful conspiracy to injure and destroy respondent's business, the constitutional guarantees will not prevent the restraint of the entire scheme, including the alleged peaceful picketing.

The fact that the Illinois Supreme Court held that the picketing as conducted in this case was itself unlawful does not enlarge petitioners' rights nor distinguish the *Aikens* case, for whatever the character of the activities enjoined the fact remains that they were intended to effect an unlawful purpose. Petitioners further assert that the Illinois Supreme Court recognized the absence of personal animus in this case, thus implying that the malicious intent present in the *Aikens* case was absent here. Petitioners misstate the opinion of the Illinois Supreme Court, for all that Court did was to state petitioners' *claims* that their motive was their own welfare and that they did not have any personal animus toward the respondent (R. 338). The Illinois Court not only determined that the activities of the petitioners were malicious and without any justification, but also supplemented its determination of the legal issues upon admitted facts by the following statement (R. 339):

> "We have, to this point, considered the legal propositions involved upon the facts admitted by the appellees. The facts in the record present a situation stronger than the mere claim of self-protection on the part of the appellees, and the carrying out of peaceful measures to enforce such alleged rights."

The Court then delineates the facts with reference to the unlawful conspiracy and the violence, interference, threats and intimidation, together with the boycotting and picketing, by which the illegal purpose was effected.

1. The Constitutional Right of Free Speech Cannot Be Invoked as a Cloak for Means Used in Effecting an Unlawful Interference With the Right to Carry on Business.

The *ratio decidendi* of the *Gompers* and *Aikens* cases has been consistently applied by this Court. It is founded upon the accepted definition of a conspiracy, *i. e.*, a combination of two or more persons by concerted action to accomplish an unlawful purpose, or to accomplish a purpose not unlawful in itself by unlawful means. If the purpose be unlawful it may not be carried out even by means that otherwise would be legal.

Pettibone v. *United States*, 148 U. S. 197, 203.
Duplex Printing Co. v. *Deering*, 254 U. S. 443, 465.

The Illinois Supreme Court found that the petitioners had combined by concerted action to injure and destroy respondent's business without any justification (R. 338).

Interference with the right to carry on business without just cause is unlawful. The decisions of this Court on that proposition cannot be questioned.

Dorchy v. *Kansas*, 272 U. S. 306, 311.
Duplex Printing Co. v. *Deering*, 254 U. S. 443, 465.
American Steel Foundries v. *Tri-City C. T. Council*, 257 U. S. 184, 202.
Truax v. *Corrigan*, 257 U. S. 312, 329.

The unlawful purpose of the combination having been established, the fact that the means by which it was effected were peaceful, orderly and otherwise lawful, does not render either the combination or the means used free from punishment or prevent the restraint thereof.

In *Dorchy* v. *Kansas*, 272 U. S. 306, in an opinion by Mr. Justice Brandeis, this Court said (p. 311):

"The right to carry on business—be it called lib-

> erty or property—has value. To interfere with this right without just cause is unlawful. The fact that the injury was inflicted by a strike is *sometimes* a justification *But a strike may be illegal because of its purpose however orderly the manner in which it is conducted.* * * * *Neither the common law, nor the 14th Amendment confers the absolute right to strike.*"

Neither does the 14th Amendment confer the absolute right of free speech in the conduct of alleged "peaceful picketing" in furtherance of the unlawful combination of the petitioners to interfere with the respondent's right to carry on business.

Petitioners refer (Brief, p. 46) to the alleged failure of the respondent to sign a contract with the petitioner union as justification for their campaign of interference. They assert that their purpose was the unionization of the milk industry, and that to effectuate such purpose they had the right to compel respondent to change its method of doing business by interfering with the sales of respondent's product, so long as the means used were peaceable.

The record shows that neither the respondent nor the vendors selling its products could have entered into a contract with the petitioner Union, unless the respondent agreed to the Union's demand that it change its method of doing business from wholesale sales to independent vendors to that of the employment of retail drivers for distribution of its products (R. 228-230). The Illinois courts held that the combination of petitioners to coerce such desired change was an unlawful interference with respondent's right to carry on its business. This holding was based upon the constitutional, statutory and common law of the State and the public policy expressed therein. While the decision of the State courts on this proposition is conclusive, it is in accord with the decisions of this Court cited above.

In the case of *Hitchman Coal & Coke Co.* v. *Mitchell,*

245 U. S. 229, a union sought to compel mine owners to change their method of operation. The Court answered the contention there made that the means used were lawful and therefore could not be restrained, by saying (p. 257):

> "Another fundamental error in defendants' position consists in the assumption that the measures that may be resorted to are lawful if they are 'peaceable' —that is, if they stop short of physical violence or coercion through fear of it. In our opinion, any violation of plaintiff's legal rights contrived by defendants for the purpose of inflicting damage, or having that as its necessary effect, is as plainly inhibited by the law as if it involved a breach of the peace."

As stated, the proposition just considered proceeds upon the assumption that the means used by petitioners were peaceful and such as would, under other circumstances, be considered legal. In the instant case we are not limited to the consideration of cases holding that such alleged peaceful means become unlawful when shown to be constituent elements of an illegal combination. The record shows that none of the means used was of the "peaceful" description given by petitioners, for they consisted of acts of violence, threats, intimidation and an illegal boycott and interference with the business of persons selling respondent's products. This case therefore presents not only a combination unlawful in purpose, but one intended to be accomplished by means unlawful in themselves.

Petitioners refer to decisions of State courts holding that an injunction restraining peaceful picketing in a labor dispute violates the constitutional guarantee of free speech. Examination of such cases discloses that, in the jurisdictions where rendered, the picketing was in furtherance of a strike or boycott, lawful in the particular jurisdiction. This was the situation in the case of *Senn v. Tile Layers Protective Union*, 301 U. S. 468, upon which the courts in most of the cases cited by petitioners

rely. In that case Mr. Justice Brandeis noted that both the means employed and the end sought by the union were legal under the Wisconsin statute as construed by the highest court of the State. After stating that the question for the determination of this Court was whether either the means or the end sought *was forbidden* by the Federal Constitution, the opinion continues with the oft-quoted statement (p. 478):

> "Clearly the means which the statute authorizes—picketing and publicity—are not prohibited by the Fourteenth Amendment. Members of a union might, without special statutory authorization by a State, make known *the facts of a labor dispute*, for freedom of speech is guaranteed by the Federal Constitution."

This statement was made in support of the Court's conclusion that picketing was *not prohibited* by the Fourteenth Amendment. Petitioners are not warranted in interpreting it as holding that the Fourteenth Amendment confers an *absolute right to picket* under any and all circumstances. For, immediately following the statement quoted above, the Court referred to the power of the State to regulate the methods and means of publicity and called particular attention to the fact that the Wisconsin statute permitted "*peaceful* picketing" *in a labor dispute* as therein defined, where it was done "without *intimidation* or *coercion*" and free from "*fraud, violence, breach of the peace* or threat thereof."

This Court declared that inherently the means authorized by the statute were clearly unobjectionable, only after stating (p. 479):

> "The statute provides that the picketing must be peaceful; and that term as used implies not only absence of *violence, but absence of any unlawful act.* It precludes *the intimidation of customers.* It precludes *any form of physical obstruction or interference with the plaintiff's business.* It authorizes giving publicity to the existence of the dispute 'whether by advertising, patrolling any public streets or places where any person or persons may lawfully be;' but

precludes *misrepresentation of the facts of the controversy.* And it declares that 'nothing herein shall be construed to legalize a *secondary boycott.*' "

It is apparent that, had any of the factors italicized in the foregoing quotation been present in the picketing there considered, the "peaceful picketing" means would not have been considered unobjectionable and within the constitutional guaranty of free speech. The record in this case shows that all of these factors were present in conjunction with and inseparable from the alleged "peaceful picketing" in the case at bar. The factual situation in this case so clearly distinguishes the holding in the *Senn* case that we risk the charge of redundancy in detailing them at this point:

(a) The highest Court of the State of Illinois determined that *no labor dispute existed* in this case as that term was defined in the Illinois Anti-Injunction Act, nor under the public policy[3] of the State, as applied to the facts in the record (R. 335-338).

(b) The Court found that numerous *unlawful acts were present* with the picketing (R. 340, 342).

(c) Acts of *violence and crimes* were committed by members of this Union against the picketed stores (R. 231, 339).

(d) Store owners and *customers* of the vendors selling respondent's products were intimidated (R. 231, 232, 340).

(e) *Interference with respondent's business* was the object of the program, by *obstructing* retailers selling respondent's products and *interfering* with deliveries of other commodities to such storekeepers (R. 232, 339).

(f) In the absence of a labor dispute under the law of Illinois, the characterization of these stores as "unfair" to the petitioners Union was a *misrepresentation of the facts* (R. 338).

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3. The public policy of a State in labor relations is a question for State determination. In the *Senn* case this Court so held as to the Wisconsin law permitting a union to attempt to induce an employer to refrain from working with his own hands, saying (p. 481):

"Whether it was wise for the State to permit the unions to do so is a question of its public policy—*not our concern.*"

(g) The picketing was illegal as constituting a *secondary boycott*[4] prohibited by the law of Illinois (R. 334).

The decision of this Court in the *Senn* case, when analyzed in conjunction with the factual situation present in the instant case, is an authority against, rather than one supporting, petitioners contention that the picketing conducted by them was entitled to the protection of the Fourteenth Amendment.

There are, moreover, numerous cases in the State courts which hold that the constitutional right of free speech does not preclude an injunction against picketing in furtherance of an unlawful purpose, that is, one contrary to the public policy or statutory law of the particular jurisdiction.

Hotel & Restaurant Employees' Int. Alliance v. *Wisconsin Employment Relations Board*, C. C. H. Labor Law Service, § 60126, p. 60370, decided Nov. 8, 1940.

Roth v. *Local Union of Retail Clerks* (Ind.), 24 N. E. (2d) 280, 282.

Campbell v. *Motion Picture Machine Operators Union*, 151 Minn. 990, 186 N. W. 721.

Hughes v. *Motion Picture Operators*, 282 Mo. 304, 221 S. W. 95; certiorari denied by this Court in 254 U. S. 632.

Evening Times Printing & Publishing Co. v. *American Newspaper Guild*, 124 N. J. Eq. 71, 199 Atl. 598.

4. The Illinois Supreme Court stated that it was unnecessary to determine whether these acts constituted a secondary boycott for the reason that they were an illegal invasion of respondent's constitutional rights (R. 340). However, the Court held that the Illinois Anti-Injunction Act could not control the factual situation presented in this case unless it was construed to be broad enough to apply "to secondary boycotts" (R. 334). The Court also concluded its opinion by referring to its "decisions condemning boycotts" as justifying the injunction against the combination of and the concerted picketing conducted by petitioners (R. 344).

Mitnick v. *Furniture Workers Union*, 124 N. J. Eq. 147, 200 Atl. 553.

Miller's Inc. v. *Journeymen Tailors Union* (N. J.), 7 L. R. R. 240, decided Oct. 10, 1940.

Carpenters Union v. *Ritter's Cafe* (Texas), 138 S. W. (2d) 223, decided Feb. 15, 1940.

In the cases cited above which were decided during the present year, the courts distinguish the recent decisions of this Court dealing with the right of free speech, especially those of *Thornhill* v. *Alabama*, 310 U. S. 88, and *Schneider* v. *Irvington*, 308 U. S. 147, pointing out that such decisions do not apply to facts showing that the picketing was in furtherance of an unlawful purpose. The courts further state that the facts in the cases under consideration brought them within the exception noted by this Court in the *Thornhill* case.

In *Hotel & Restaurant Employees' Int. Alliance* v. *W. E. R. B.*, *supra*, the Court held, in an opinion by Chief Justice Rosenberry, that the Wisconsin Employment Peace Act did not infringe upon the constitutional right of free speech. In the course of its discussion the Court said:

> "The conduct complained of in this case and described as 'picketing' was not the sort of conduct that was indulged in by the defendant in the *Thornhill* case. The conduct complained of in this case and dealt with by the board and by the court was of an entirely different character. It was mass picketing organized and carried on by the unions *supplemented by boycott and violence* and was clearly within the exception stated in the *Thornhill* case warranting state action. In that case the Supreme Court of the United States said:
>
> > 'We are not now concerned with picketing en masse or otherwise conducted which might occasion such imminent and aggravated danger to these interests as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger.'
>
> "We discover no invasion of the right of freedom of speech either in subsec. (e) or in the way the law

was administered by the board in this case. *The right of the individual to freedom of speech is by the terms of the act left unimpaired. It is the right to concert of action that is regulated.*"

This concept of the difference between the constitutional privilege of the individual to speak and write without injunctive restraint and the attempt of a group to exercise such claimed right in concert was discussed in *Carpenters' Union* v. *Ritter's Café* (Texas), 138 S. W. (2d) 223, wherein the Court quotes from Oakes on Organized Labor, 1927 Ed., p. 884, § 880, as follows:

> "The right of free speech is limited by the constitutional rights of others to acquire and possess property, an instance of which is the right to carry on a business in a lawful way. It has been said that it does not follow that because a single individual may under the constitutional guaranty freely speak and write as he pleases without injunctive restraint, an association or combination of persons may lawfully do likewise, as, in such cases, the views expressed are not merely those of the individual, but the express concerted will and desire of a powerful organization."

Cf. Hague v. *C. I. O.*, 307 U. S. 497, 527.

The more so must the claim of the group to exercise such right in concert be denied where the activity is part of a scheme of interference with the constitutional right of others to carry on their business and is accompanied by unlawful acts giving to the speech the effect of force and coercion.

2. The Decisions of This Court Interpreting the Right of Free Speech Relied Upon by Petitioners Are Not Applicable to the Factual Situation in This Case.

The question for decision in this case is not the constitutional validity of a penal statute or ordinance prohibiting all picketing activity under the guise of regulation. The situation presented is markedly different from the prospec-

tive operation of the sweeping statutes and ordinances considered by this Court in

Thornhill v. *Alabama,* 310 U. S. 88;
Carlson v. *California,* 310 U. S. 106;
Schneider v. *Irvington,* 308 U. S. 147;
Lovell v. *Griffin,* 303 U. S. 444;
Cantwell v. *Connecticut,* 310 U. S. 296; and
Near v. *Minnesota,* 283 U. S. 697.

The injunctive relief granted in this case operates retrospectively upon facts established according to judicial process and principles. The prospective effect of the retraint is the result of the remedy provided by equity by reason of the deficiency of the legal remedy for wrongs inflicted and threatened. But the remedy is provided only where the wrong is established. The threat of damage, or of the continuation thereof, in such cases is in equity equivalent to damge done:

Hitchman Coal & Coke Co. v. *Mitchell,* 245 U. S. 229, at page 256.

The power of court of equity to grant the only relief which can remedy the wrong, *i. e.,* to enjoin the continuation of an unlawful program in all its aspects, is not circumscribed by the decisions of this Court, which hold that a State may not penalize and thus create a previous restraint of all speech in a given activity, such as picketing, without regard to the lawfulness of the objectives, or under the guise of a regulation of danger, neither clear nor always present in the particular activity proscribed.

Petitioners claim that the injunctive relief in this case constitutes a "previous restraint" upon communication as defined by this Court in *Near* v. *Minnesota,* 283 U. S. 697, at pages 713, 714. The opinion in that case not only recognizes that protection against previous restraint of publication is not unlimited, but specifically excepts from

that doctrine the power of a court of equity to prevent publication in order to protect private rights, such as are here involved. The Court, through Mr. Chief Justice Hughes, said (p. 715):

> "The objection has been made that the principle as to immunity from previous restraint is stated too broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. * * * The constitutional guaranty of free speech does not 'protect a man from an injunction against uttering words that may have all the effect of force. Gompers v. Buck's Store & Range Co., 221 U. S. 418, 439, 44 L. ed. 797, 805, 34 L. R. A. (N. S.) 874, 31 S. Ct. 492.' Schenck v. United States, supra. These limitations are not applicable here. Nor are we now concerned with *questions as to the extent of authority to prevent publications in order to protect private rights according to the principles governing the exercise of the jurisdiction of courts of equity.*"

The fact that private rights only are involved in the instant case and that the injunctive relief operates retroactively upon facts judicially established, distinguishes the cases relied upon by petitioners and shows the inapplicability of the "clear and present danger rule" used as a test for the reasonableness of the regulation of free speech in such cases. The element of clear and present danger must be present where the legislature proscribes conduct in general terms or delegates to an executive officer the power to determine when such conduct should be prohibited.

It should also be noted that in each of the cases cited by petitioners, this Court took cognizance of the sweeping character of the particular legislation under consideration and the fact that it failed to differentiate between conduct of the same nature which might be lawful or unlawful according to circumstances not delineated in the challenged legislation.

For example, in the *Thornhill* case, this Court said at page 105:

> "The State urges that the purpose of the challenged statute is the protection of the community from the violence and breaches of the peace, which, it asserts, are the concomitants of picketing. The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents cannot be doubted. But no clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter. We are not now concerned with picketing en masse or otherwise conducted which might occasion such imminent and aggravated danger to these interests as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger. Compare American Steel Foundries *vs.* Tri-City Central Trades Council, 257 U. S. 184, 205, 66 L. ed. 189, 197, 42 S. Ct. 92, 27 A. L. R. 360. Section 3448 in question here does not aim specifically at serious encroachments on these interests and does not evidence any such case in balancing these interests against the interest of the community and *that of the individual in freedom of discussion on matters of public concern.*"

Again in *Cantwell* v. *Connecticut*, 310 U. S. 296, the Court said, on page 308:

> "The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace or order, appears, the power of the state to prevent or punish is obvious. Equally obvious is it that a state may not unduly suppress free communication of views, religious or other, under the guise of

> conserving desirable conditions. Here we have a situation analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application."

Even though it is assumed that the clear and present danger test applies where private rights only are concerned the record in this case discloses a factual situation covered by that rule, for the injunction restrained not "peaceful picketing" but violence, force, threats and intimidations, which accompanied the picketing activities to such an extent that the picketing itself was anything but peaceful and had the effect of force and coercion of those against whom it was directed (R. 340).

B. The Decision of the State Court That the Alleged "Peaceful Picketing" Was Unlawful Per Se and Inseparable from the Unlawful Conspiracy and Other Illegal Acts of the Petitioners in Furtherance Thereof, Is Not Reviewable.

Petitioners contend (Brief, p. 62), that the Illinois Supreme Court treated acts of "prior violence" as a ground for enjoining all "peaceful picketing", and that the Court was in error in not separating the lawful acts of alleged peaceful picketing from the unlawful acts of violence for the purpose of restraining only the latter.

This argument demonstrates a further misconception of petitioners as to the basis of the decision below. The State Court did not enjoin violence and picketing in themselves. That Court restrained the petitioners from continuing an unlawful conspiracy. The acts of violence and picketing were only part of the means by which the illegal purpose of the combination was effected.

The question presented upon this record is whether the means used to accomplish an unlawful conspiracy which,

absent the illegal purpose, might be lawful, may for that reason be free from restraint by a court of equity. The answer given by all the authorities in such a case is in the negative. To hold that the means by which a conspiracy was accomplished are not subject to restraint would be to render courts of equity impotent when dealing with unlawful combinations. In the *Gompers* case, this Court said (221 U. S. at p. 438):

> "To hold that the restraint of trade under the Sherman Anti-Trust Act, or on general principles of law, could be enjoined, but that the means through which the restraint was accomplished could not be enjoined, would be to render the law impotent."

The Illinois Supreme Court held that the combination of petitioners and their activities thereunder constituted a restraint of trade by stifling competition and creating a monopoly. The petitioner Union was indicted under the Sherman Act and charged with conspiracy to restrain interstate commerce. (*United States* v. *Borden Company, et al.*, 308 U. S. 188.)

We have previously contended (p. 10, *supra*) that the question of the separability of alleged lawful acts from those concededly unlawful is one of general law upon which the decision of the State court is conclusive. The question is primarily one, the solution of which depends upon the particular facts before the Court and the application of equitable principles to the factual situation presented. Even though it is assumed that the decision of the Illinois Supreme Court in this respect is subject to review, it should not be disturbed unless the reviewing court concludes that the decision of the court below amounts to an abuse of the discretion vested in a court of equity.

1. EVEN IF THIS QUESTION WERE SUBJECT TO REVIEW, THE DECISION OF THE STATE COURT IS IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT AND IS SUSTAINED BY THE GREAT WEIGHT OF AUTHORITY.

Petitioners refer to the case of *American Steel Foundries* v. *Tri-City C. T. Council*, 257 U. S. 184, as supporting their contention that peaceful picketing may be permitted, although acts of violence are restrained. An examination of the opinion in that case discloses that this Court *affirmed the restraint of picketing*, as there conducted, and refused to sustain the qualification of the Court of Appeals to the decree of the District Court restraining picketing, by the addition of the words "in a threatening or intimidating manner". This Court held that the restraint of all persuasion was contrary to the policy expressed in the Clayton Act, and directed the modification of the decree of the District Court in that respect only. However, on the particular point upon which petitioners cite this case, the Court held that the picketing was properly restrained because it was inseparable from the unlawful campaign conducted by the union and therefore in itself unlawful. It should be noted that the union there made the same claim advanced by the petitioners here, viz., that they had admonished their members to pursue only peaceful methods. The Court's decision in this respect is stated, on page 205:

> "*When one or more assaults or disturbances ensued, they characterized the whole campaign*, which became effective because of its intimidating character, in spite of the admonitions given by the leaders to their followers as to lawful methods to be pursued, however sincere. *Our conclusion is that picketing thus instituted is unlawful and cannot be peaceable* and may be properly enjoined by the specific term because its meaning is clearly understood in the sphere of the controversy by those who are parties to it."

Contrast the above language of this Court with that of the Illinois Supreme Court in the case at bar:

"The evidence shows that, in addition to picketing the stores handling appellants milk by men carrying banners bearing the words 'unfair to Milk Wagon Drivers Union,' etc., *numerous instances of assaults* upon the independent vendors occurred; that *trucks hauling milk were overturned and damaged;* that *windows of the stores were broken and stink bombs and explosives thrown in or upon the stores of the distributors of appellant's milk.* In several instances it is shown these unlawful acts were committed by members of defendant union, but it is claimed that these were their personal acts, and not the act of the union or done with the authority of the union. The evidence, however, further discloses that *when any of these law breakers were apprehended they were represented by an attorney of the union, their fines were paid out of union funds and damages were paid for destruction of property in like manner, and there is nothing in the record to indicate that any of these offenders were disciplined in any manner by the defendant union.* There is some authority for the proposition that such conduct constitutes a ratification by the union of such illegal acts. (*Alaska S. S. Co.* v. *International Longshoremen's Ass'n,* 236 Fed. 964; *Great Northern Railway Co.* v. *Local Lodge,* 283 id. 557.) *Whether it does or not, picketing by the carrying of a banner, with the words 'unfair,' etc., printed thereon, in connection with or following a series of asaults or destruction of property,* could not help but have the effect of intimidating the persons in front of whose premises such picketing occurred and of causing them to believe that non-compliance would possibly be followed by acts of an unlawful character. Certainly it is not within the power of the retailers to prevent unlawful acts and *if the defendant union puts in motion a policy which its members deem to be an invitation or license to injure persons and property, it cannot, in equity, claim that there can be a severance of the lawful acts from the unlawful ones, and thus, by disclaiming an illegal purpose, take advantage of illegal acts.*" (R. 339, 340.)

The case of *Iron Molders Union* v. *Allis-Chalmers*, 166 Fed. 45 (C. C. A. 7), cited by petitioners on this proposition, is the case which the Circuit Court of Appeals followed in the *American Steel Foundries* case in qualifying the restraint of picketing decreed by the District Court. This Court reversed the Court of Appeals with respect to such qualification and therefore the decision of the Seventh Circuit cannot be considered an authority on this proposition.

Petitioners refer to the case of *Fenske Bros.* v. *Upholsterer's Union*, 358 Ill. 239, 193 N. E. 112, in which the Illinois Supreme Court said that the "fact that acts of violence had been previously committed would *of itself* furnish no justification for enjoining legal acts of peaceable persuasion". This language, together with the statement of the Illinois Supreme Court in the case of *Ellingsen* v. *Milk Wagon Drivers Union*, 2 Labor Cases 576, that violence was not the ground of its decision in this case, fortifies our contention that the restraint granted in this case was not based upon acts of "prior violence" but upon the illegality of the entire program of petitioners. In this connection it should be noted that the Illinois Supreme Court said in the *Fenske* case (p. 258):

> "It is not to be presumed that the legislature contemplated legalizing peaceful persuasion in furtherance of an *unlawful strike or actionable conspiracy, because by the same token the peaceable acts would become unlawful.*"

The criticism directed by petitioners against this and other recent decisions of the Illinois Supreme Court leave an implication that the Illinois Court is hostile to the legitimate purposes of labor organizations and fails to give effect to the free speech guaranty of the Federal Constitution. The decision of the Illinois Supreme Court in this case, grounded as it was upon the existence of an unlawful conspiracy to injure and destroy respondent's

business, was not directed against labor organizations as such. The same principles of law were applied by that Court *in favor of the Carpenters Union* and an injunction was awarded to that union to restrain a Citizens' Committee from boycotting or otherwise interfering with the employment of its members. See *Carpenters' Union* v. *Citizens Committee,* 333 Ill. 225, 164 N. E. 393.

The attitude of the Illinois Supreme Court with reference to freedom of speech is shown by its recent decision in the case of *South Holland* v. *Stein,* 373 Ill. 472, 26 N. E. (2d) 868, in which that Court held unconstitutional a municipal ordinance forbidding solicitation and canvassing without obtaining a permit from the village board. The Court not only followed the decisions of this Court in the cases of *Lovell* v. *Griffin,* 303 U. S. 444, and *Schneider* v. *Irvington,* 308 Ill. 147, but pointed out that the Constitution of Illinois is even more far reaching than that of the United States in regard to the right of free speech.

2. A Court of Equity, in the Exercise of a Wise Discretion Upon Consideration of the Unlawful Campaign Conducted by Petitioners, Could Reach No Conclusion Other Than to Enjoin the Illegal Scheme in Its Entirety.

The principle is well settled that where acts, which otherwise might be classed as peaceful and lawful, are interwoven with a program of violence and intimidation, the entire scheme, including the ordinarily lawful acts, may be enjoined by a court of equity. A contention in all respects similar to that advanced by the petitioners was considered in the case of *Vaughan* v. *Kansas City Moving Picture Operators Union,* 36 F. (2d) 78, in which the Court said, on page 81:

> "The hostile attitude of the defendants has been so impressed upon the public and upon the mind of plaintiff that even an act which might ordinarily be classed

as a peaceful and lawful act would be considered in the public mind as sinister in purpose and effect. *Such acts are interwoven with a plan of intimidation and destruction.* Even if the bill and the evidence justified an order pointing out what the defendants might ordinarily lawfully do, the court would be seriously embarrassed in this case in such an undertaking. *United States* v. *Railway Employees' Department of American Federation of Labor* (D. C.) 283 F. 479, loc. cit. 494. In the above case, Judge Wilkerson of the Northern District of Illinois had before him a very similar situation. He disposed of it in the following language:

> "'The record in this case shows that the so-called peaceable and lawful acts are so interwoven with the whole plan of intimidation and obstruction that to go through the formality of enjoining the commission of assaults and other acts of violence and leave the defendants free to pursue the open and ostensibly peaceful part of their program would be an idle ceremony.'"

This principle was enunciated by the New York Court of Appeals *in a case cited by petitioners as sustaining their contention.* It will be recalled that the New York statute on Labor Relations is quite liberal and similar to the *Norris-LaGuardia Act.* In *Baillis* v. *Fuchs,* 283 N. Y. 133, 27 N. E. (2d) 812, where the Court held a labor dispute was involved as defined by the New York statute, the Court said (p. 814):

> "The statute (Civil Practice Act § 876-a) is explicit in its provisions in support of the right of picketing. *This guaranty of the employees' right cannot, however, be made a shield for violence, disorder and crime.* The power of the courts to enjoin violence in a 'labor dispute' is beyond question, and, *when necessary, this power may even authorize a prohibition of all picketing.* Such was the case in *Busch Jewelry Co.* v. *United Retail Employees Union,* 281 N. Y. 150, 22 N. E. 2d 320, 124 A. L. R. 744."

In the case of *Nann* v. *Raimist,* 255 N. Y. 307, 174 N. E. 690, it was likewise held that where picketing had been continued with violence and intimidation, a broad injunction

prohibiting all picketing could issue and the action of the trial court in that regard was something to be determined in the exercise of a wise discretion, with which the Court of Appeals could not interfere except for manifest abuse.

The factual situation presented by the record in this case, disclosing an illegal combination put into effect by assaults, beatings, malicious mischief, arson, threats and intimidation of the owners and customers of the picketed stores, is such that a court in the exercise of its equitable powers had no choice but to enjoin the unlawful combination in all its aspects. The decision of the Illinois Supreme Court in this respect, even though subject to review here, is fully in accord with decisions of this Court and of courts of other States known to be liberal towards labor organizations.

Conclusion.

The record in this case presents no question of the abridgement of petitioners' claimed right of free speech. The injunction granted by the State courts did not invade the right of any of the *individual* petitioners to freedom of speech or other liberties guaranteed by the Federal Constitution. It simply enjoined a program unlawful in its purpose and in the means by which the petitioner Union sought to accomplish the intended result of destroying respondent's business. That program, encompassing as it did illegal acts of the gravest nature, in addition to an illegal boycott, was put in operation by the petitioners. The fact that they are incidentally restrained from acts which, under other circumstances would be lawful in the State of Illinois and elsewhere, is the result of their own unlawful concerted action. They have by their own action forfeited the right to ask a court of equity to pick and chose from their unlawful program that part, which they are wont to call "peaceful picketing," and thus permit them to be free to carry on their unlawful purposes by such allegedly

lawful means. "Peaceful picketing" as that term is understood and defined by courts generally was not the activity of the petitioners in this case, and their claim for protection of free speech under the Fourteenth Amendment of the Federal Constitution is without foundation.

Respondent respectfully submits that the judgment and decree of the Illinois Supreme Court is correct and should be affirmed.

Respectfully submitted,

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